**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**
**Plaintiff-Appellant,**

**v**

**WILLIAM LYLES, JR.** **No. 150040**
**Defendant-Appellee.**

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**L.C. No. 12-008021-FC**
**COA No. 315323**

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# SUPPLEMENT TO APPLICATION ON DIRECTION OF THE COURT

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## Statement of the Question

**I.**

**The "character alone raising a reasonable doubt" portion of M Crim JI 5.8a(1)) should not be given, and even if the remaining portion of the instruction should be given, it does not add to the general instructions to the jury on witness testimony. Here the trial judge did not give the instruction, but instead gave an irrelevant instruction, M Crim JI 5.8. Given the nature of the error, and the record of this case, can defendant show that the giving of the irrelevant instruction, and the absence of an instruction under M Crim JI 5.8a(1), was more probably than not outcome determinative?**

**The People answer: "NO"**

## Statement of Facts

On December 27, 1983, Melissa Kountz, Kimberly Stokes, Louise Kountz, Jimmy Goodwin, and Andrew (Melvin) Weathers lived on 88 Louise in Highland Park. When they went to bed that night the electricity and telephone were working, the front door was locked, and the basement window was intact.[1] Then on December 28, 1983, the household of 88 Louise, was awoken by the sounds of Melvin gasping for his last breaths.

In the early morning hours of December 28, 1983, Kimberly thought she was dreaming when she heard Melvin calling for her mother, Louise.[2] Melissa also heard the faint calls by Melvin for her mother.[3] Then Louise jumped out of her bed and shouted for everyone to hit the ground, afraid it was another incident of a brick being thrown at their house.[4] Louise, Jimmy, Melissa, and Kimberly found themselves in the hallway, without being able to turn on the lights or use the phone, but they could hear what sounded like Melvin gasping for air.[5] Louise told Melissa and Kimberly to go next door and call the police.[6] As the girls walked down the steps, Melissa ahead of Kimberly, Melissa could hear another person ahead of them, also walking down the steps.[7] As they walked down the steps, Melissa was able to see and smell the figure of the

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[1] 1/15, 105-106.

[2] 1/16, 180.

[3] 1/16, 68.

[4] 1/15, 106-108.

[5] 1/15, 107-108; 1/16, 181.

[6] 1/15, 108; 1/16, 182.

[7] 1/15, 110, 113.

person ahead of her and she was certain it was defendant.[8] Kimberly at first was unsure why Melissa was walking down the steps so slowly and nudged Melissa, Melissa turned around and motioned for Kimberly to slow down, then Kimberly also noticed the figure ahead of them.[9] The build of the figure matched that of defendant's and in Kimberly's mind the figure ahead of them was in fact defendant.[10]

Once the girls were able to make it down the stairs, they no longer saw defendant ahead of them.[11] There were five exits in their home and they were both unsure which exit defendant used to leave the house.[12] They unlocked the front door and proceeded out of their home and ran to their neighbors home, the Rhodman's.[13] Carolyn Rhodman opened the door for Melissa and Kimberly, both of whom were visibly upset, crying, and shaking, when they both told Carolyn that defendant killed Melvin.[14] Carolyn assisted them in calling 9-1-1.[15] Kimberly stayed at the Rhodman's home while Melissa returned to her home.[16] Camille Rhodman, Carolyn's daughter,

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[8] 1/15, 113-114.

[9] 1/16, 183-184.

[10] 1/16, 183-184.

[11] 1/15, 116-117; 1/16, 185.

[12] 1/16, 14; 1/16, 185.

[13] 1/16, 78.

[14] 1/17, 95-97.

[15] 1/17, 98.

[16] 1/17, 98.

8 years old at the time, was awoken by Melissa and Kimberly. While standing at the top of the stairs, Camille heard Melissa say that defendant came into the house.[17]

When Melissa returned home, the police had arrived, but the lights were not on.[18] Melissa was able to sneak upstairs. She saw two officers at the top of the stairs with flash lights, shining their light on Melvin.[19] She saw Melvin lying on the floor with a butcher knife, from a knife block set in her kitchen, protruding out of his chest.[20] Melissa snuck back downstairs and followed the officers to the basement where they were able to reconnect the fuse and turn the lights on.[21] In the basement, a window was broken, and their puppy was missing.[22] The puppy was found in the freezer.[23] After the lights were on, Melissa returned upstairs where she saw defendant's shoes placed underneath a light switch behind the kitchen door.[24] Melissa saw a sponge taped to the bottom of one of the shoes.[25] She identified the shoes as belonging to

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[17] 1/17, 118.

[18] 1/15, 127-128.

[19] 1/15, 127-128.

[20] 1/15, 128-129.

[21] 1/15, 130.

[22] 1/15, 131-133. They kept their puppy in the basement overnight. 1/15, 132.

[23] 1/15, 133.

[24] 1/16, 10-11.

[25] 1/16, 12-13.

defendant and described them as brown loafers.[26] Defendant's shoes were not there the night before.[27] After that night defendant was no where to be seen, smelled, or heard of.[28]

Defendant's contact with the household of 88 Louise began several years before 1983, when he and Louise Kountz entered into a relationship shortly after her divorce. Almost immediately after the divorce, defendant moved in to Louise's house on 88 Louise, with Louise, Melissa, Kimberly, and Carrie Weathers.[29] Carrie was Melvin's sister and was Louise's first cousin.[30] Defendant told Carrie several times that he did not want her living there.[31] Carrie was uncomfortable living there.[32] Carrie described defendant and Louise's relationship as "brutal" and that she would see defendant hit Louise almost every other day.[33] Eventually, Carrie moved out because of defendant and was not allowed to return to 88 Louise.[34] At one point, Carrie inquired about moving back in.[35] When Louise presented defendant with the idea he said "over

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[26] 1/16, 10-12.

[27] 1/16, 12.

[28] 1/15, 135; 1/16, 192.

[29] 1/16, 160.

[30] 1/17, 62.

[31] 1/17, 69.

[32] 1/17, 69-70.

[33] 1/17, 65-66.

[34] 1/17, 70-72.

[35] 1/15, 91.

my dead body or hers."[36] Defendant then, without any clothing on, walked downstairs and came back upstairs holding a butcher knife and stabbed it in the middle of the bed.[37] Carrie did not move back in to 88 Louise. Melvin moved in to 88 Louise after Carrie moved out.[38]

Defendant continued to live with Melissa, Kimberly, and Louise for about four years.[39] Louise worked at Michigan Bell almost every day.[40] Defendant was never seen going to work.[41] Melissa's memory of defendant and her mother's relationship was that it was very abusive.[42] Over time the relationship got worse.[43]

Melissa described several instances of the abuse. One instance was when defendant raped Louise in front of her. Louise and Melissa were watching television when defendant asked Louise to go upstairs several times, but Louise refused.[44] Defendant then picked Louise up and tried to carry her up the stairs, but Louise was holding on to the bannister with both hands trying to stop defendant from taking her upstairs.[45] Eventually, defendant threw Louise on the floor in

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[36] 1/15, 93.

[37] 1/15, 93-94.

[38] 1/15, 57; 1/16, 160.

[39] 1/15, 56.

[40] 1/15, 58.

[41] 1/16, 176.

[42] 1/15, 61.

[43] 1/16, 162.

[44] 1/15, 63.

[45] 1/15, 63.

the front room. Melissa ran upstairs, changed out of her pajamas, and went back downstairs where she saw her mother Louise on the floor crying.[46] Melissa grabbed a fireplace poker and hit defendant on the back.[47] Melissa saw defendant physically inside her mother.[48] Melissa got scared and ran out of the house, Kimberly and Melvin followed.[49] They all ran to Melissa and Kimberly's grandmother's home.[50]

Kimberly also witnessed the abuse between defendant and her mother. Defendant once whipped Kimberly after he found out she got in a fight with his cousin.[51] Kimberly called her mother to tell her what defendant had done, and her mother came home on her lunch break.[52] Defendant "beat up" Louise in the living room with an open and closed fist.[53] In another instance, defendant asked Louise for money and said to her "if you don't, then you'll come home to some dead kids."[54] Defendant would also snatch Louise's purse and hit Louise.[55] Melissa and

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[46] 1/15, 64.

[47] 1/15, 64.

[48] 1/15, 64.

[49] 1/15, 64.

[50] 1/15, 66.

[51] 1/16, 164.

[52] 1/16, 164.

[53] 1/16, 165-166.

[54] 1/15, 70.

[55] 1/15, 71.

Kimberly did not call the police because they were taught that what happens in the home stays in the home, and even when the police came, defendant would always return to their home.[56]

Defendant's violence was known by many. George Arnold, aware of defendant's violent behavior, moved in to 88 Louise around 1981 or 1982 for less than a year, to look after Melissa and Kimberly.[57] While living there, Arnold saw defendant hit Louise and when he tried to intervene defendant slapped Arnold "upside" his head.[58] In another incident, when Arnold saw defendant hitting Louise, he grabbed a cast iron skillet to hit defendant, but defendant left the house.[59] Arnold also described an incident where Louise and defendant were having an argument and Arnold was told to go outside. While Arnold was on the porch he heard defendant say "I don't give a fuck about your nephew or your brother, I'll kill all you bitches."[60] Afterwards, defendant hit Arnold several times with a closed fist, until Arnold was able to run away.[61] Arnold felt like his presence was putting Louise in more danger.[62] Arnold moved out of 88 Louise because he was scared.[63] Arnold remembered that defendant smelled all the time.[64]

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[56] 1/15, 88; 1/16, 171-172.

[57] 1/17, 8-9; 1/17, 126-127.

[58] 1/17, 130.

[59] 1/17, 133-134.

[60] 1/17, 137.

[61] 1/17, 137-138.

[62] 1/17, 135.

[63] 1/17, 147.

[64] 1/17, 140.

Jeffery Trent lived on 76 Louise and was the Kountz's neighbor.[65] Trent was friends with Kimberly and Melissa and remembered that defendant and Louise had a violent relationship.[66] Trent remembered one particular incident when defendant had Louise look under the hood of defendant's car when he kicked her in the butt and slammed the hood on the upper half of her body.[67] Trent immediately ran home and told his father what he saw.[68] Later he saw the police at Louise's home.[69]

Defendant moved out of 88 Louise in the Summer of 1983. Shortly after defendant moved out, Jimmy Goodwin moved in to 88 Louise.[70] One day in October 1983, Jimmy, his friend Rosco, Melvin, Kimberly, and Louise were at home playing cards, when defendant walked in, unannounced, holding a bag of pinto beans.[71] Defendant asked to speak to Louise and both defendant and Louise went outside on the back porch.[72] Melissa could hear them arguing, but could not hear what was being said.[73] When defendant and Louise walked back in the house,

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[65] 1/18, 52-53.

[66] 1/18, 54.

[67] 1/18, 55.

[68] 1/18, 55, 59-60.

[69] 1/18, 61.

[70] 1/15, 59.

[71] 1/15, 75-76.

[72] 1/15, 78-79.

[73] 1/15, 82.

Louise had a bloody nose.[74] As defendant was walking towards the front door to walk out of the house, Jimmy and Rosco began to fight with defendant. Eventually, defendant was able to break away and leave.[75] Melvin was not involved in the fight; he was scared and ran upstairs.[76] As defendant was walking away from the home, Rosco shouted "you forgot your pinto beans," and defendant responded "I'll be back."[77]

In addition to defendant's unannounced visit after moving out, he continued to call the house. Defendant would call the house and when Melissa would answer he would sometimes ask to speak to her "bitch ass mom."[78] In one instance, Melissa responded "didn't you get enough of Jimmy and Rosco beating you up do you want me to have them do it again?" Defendant in reply said "let me tell you something, little girl, you get smart with me and I'll come up to the school" and "beat my [your] ass."[79] Another time, defendant called and spoke to Kimberly, but Melissa listened to the conversation using another phone.[80] Defendant asked Kimberly if she thought he and her mother would get back together, Kimberly said "no."[81]

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[74] 1/15, 83; 1/16, 168.

[75] 1/15, 84-85; 1/16, 169.

[76] 1/15, 85; 1/16, 169.

[77] 1/15, 85.

[78] 1/15, 96.

[79] 1/15, 96-97.

[80] 1/15, 98.

[81] 1/15, 98.

Defendant also asked Kimberly if Melvin had any influence on her mother and she said "no."[82] Defendant blamed the demise of his relationship with Louise on Melvin and said "this is Melvin's fault," and "if it's the last thing I do I'm going to get Melvin, I'm going to get that Melvin."[83] Defendant blamed everything on Melvin, although Melvin was scared of him.[84] In other instances, defendant would call the house, ask for Louise, and hang up.[85] In addition to the phone calls, after defendant moved out, bricks were thrown at their house.[86] After December 28, 2013, defendant stopped calling the house, showing up at the house, and bricks were no longer thrown at their house.[87]

After Melvin's murder, statements and evidence were gathered, and (now retired) Lieutenant James Francisco, a detective at the time, issued a warrant for defendant's arrest for the murder of Andrew (Melvin) Weathers.[88] Francisco placed defendant's arrest warrant in LEIN.[89] The evidence complied regarding the murder of Melvin was stored in Highland Park's now closed courthouse, and was destroyed after the building was devastated after a tornado.[90] In

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[82] 1/16, 175.

[83] 1/15, 99; 1/16, 177.

[84] 1/16, 177.

[85] 1/15, 101-102.

[86] 1/15, 100. But Melissa and Kimberly never saw defendant throw a brick at their home.

[87] 1/15, 136.

[88] 1/16, 130.

[89] 1/16, 133.

[90] 1/16, 126.

2012, an article on Melvin's murder was in the paper, and Francisco contacted Detective Paul Thomas, with the Highland Park Police Department.[91] Afterwards, Melissa also contacted Thomas about Melvin's unsolved murder.[92] Thomas began to investigate Melvin's unsolved murder and was able to locate the original warrant and collect statements from witnesses.[93] Afterwards, Thomas sought to locate defendant and take him in custody.[94]

Using his experience from the US Marshall Service for tracking fugitives, Thomas located a home that belonged to Charlotte Lyles, who Thomas believed to be defendant's mother.[95] Around 1:00 p.m., Thomas and his partner Terry Shaw arrived to Charlotte's home and saw a man, later identified as defendant, sitting on the front porch, leaning back in a very relaxed position.[96] Thomas and his partner exited the police car and approached defendant. As they approached defendant, he was no longer relaxed, he sat straight up, and stared at Thomas as they walked towards him.[97] Once Thomas and his partner stepped onto the porch, defendant stood up. Thomas identified himself as a Highland Park Police Officer and told defendant that they were

[91] 1/17, 165.

[92] 1/17, 167.

[93] 1/17, 178-179.

[94] 1/17, 179.

[95] 1/17, 180.

[96] 1/17, 182.

[97] 1/17, 182.

working on a cold case murder investigation, but did not identify the victim.[98] Defendant said he did not know anything about it.[99]

Thomas described defendant as very unkept, his clothes were not neat, and he had an odor-an unwashed smell- possibly a smoker's smell.[100] Thomas asked defendant if he lived at the home whose porch he was sitting on, and he said that he did not.[101] Thomas also asked "who he was" and defendant said that his name was "Mark Jackson," but was unable to provide Thomas with any identification.[102] Thomas asked defendant if they could take a picture of him and he agreed. Thomas's partner took a picture of defendant and sent it to Melissa, who confirmed that the individual they had been speaking to was defendant.[103]

After it was confirmed that the individual on the porch was defendant, Thomas with his associates from the US Marshal Service, arrested defendant.[104] Defendant was taken into custody and held at the Highland Park Police Department.[105] While there, defendant waived his Miranda rights and gave a statement. Defendant stated that he and Louise Kountz were in a relationship

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[98] 1/17, 183.

[99] 1/17, 183-184.

[100] 1/17, 184.

[101] 1/17, 185.

[102] 1/17, 185-186.

[103] 1/17, 187.

[104] 1/17, 187.

[105] 1/18, 21.

and that they broke up because of their age difference; Louise was older.[106] Defendant was not upset if Louise had a new boyfriend because "if she didn't want me, I didn't want her. She was a dirty lady anyway. She got rid of her husband for me."[107] Defendant stated that he was not working at the time so Louise had her people "jump" on him so he left, he was scared of her family.[108] After he moved out of Louise's home, he moved to Mississippi.[109] Defendant stated that he never threatened to kill Louise, but that instead he was scared of her.[110] Defendant denied going to Louise's house or stabbing someone a night in December 1983.[111]

At trial, defendant presented three witnesses in his defense: Geraldine Johnson, Joann Davenport, and Kim Harden. Geraldine Johnson is defendant's oldest sister.[112] Johnson and defendant grew up in Highland Park.[113] Johnson testified that in 1971, defendant graduated from highschool and enlisted in the army from 1974 through 1977.[114] When defendant returned to Highland Park in 1977, he was employed at Chrysler.[115]

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[106] 1/18, 29.

[107] 1/18, 30.

[108] 1/18, 29.

[109] 1/18, 29.

[110] 1/18, 29.

[111] 1/18, 30.

[112] 1/18, 76.

[113] 1/18, 76.

[114] 1/18, 77.

[115] 1/18, 77.

Joann Davenport dated defendant in 1972, for about one year.[116] Davenport grew up in Highland Park, but moved to Detroit in 1975.[117] Davenport testified that she and defendant had a good relationship and that they were "good friends."[118] Davenport did not stay in touch with defendant after their relationship ended.[119] Davenport testified that while she was in a relationship with defendant he never beat her nor was he verbally abusive.[120] Davenport never lived with defendant and could not remember the last time she had seen him.[121]

Kim Harden grew up in Highland Park, but moved to California to go to school in 1980.[122] Harden described defendant like a cousin to her, she knew defendant her whole life, they lived on the same block, and their parents were very close.[123] After Harden moved to California, she would return to Michigan on occasion,[124] and when she did she would visit defendant's family home.[125] She would see defendant only if he was at his family home while

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[116] 1/18, 84.

[117] 1/18, 88.

[118] 1/18, 87.

[119] 1/18, 87.

[120] 1/18, 89-90.

[121] 1/18, 90-91.

[122] 1/18, 95.

[123] 1/18, 93.

[124] 1/18, 100. During the period of 1980-1985, Harden only return home on the holidays and during summer breaks and would only see defendant if he was at his mother's home and she was visiting. 1/18, 99.

[125] 1/18, 95-97.

she was there.[126] Harden knew Louise Kountz and throughout the 1980s, saw defendant and Kountz together about three or four times.[127] Harden described defendant as a peaceful person who did not believe in violence.[128] Harden also testified that during the 1980s, although she did not live in Highland Park, defendant did not have a reputation for being an abusive person.[129]

The People's closing argument referenced the testimony of defendant's witnesses.[130] Defendant's closing argument only mentioned the fact that defendant was in the army during the period of 1974 through 1977.[131]

Defendant did not submit any written request for particular jury instructions,[132] but did orally ask for the following jury instruction "5.88 . . .Character evidence regarding--" and the trial court responded, "Okay. All right."[133] The trial court read to the jury the following instruction:

> you've heard the testimony of - - - about witness' truthfulness. You may consider this evidence together with all other evidence in the case in deciding whether you believe the testimony of the witness, inn (sic) deciding how much weight to give that witness. The prosecutor has examined some of the defendant's character witnesses as to whether or not they heard anything bad about the

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[126] 1/18, 96-97.

[127] 1/18, 103-104.

[128] 1/18, 99-100.

[129] 1/18, 102-103.

[130] 1/18, 128.

[131] 1/18, 140.

[132] 1/18, 109.

[133] 1/18, 168.

> defendant. You should consider such cross- examination only in deciding whether or not you believe the character witness and whether they described the respondent fairly.[134]
>
> The- - - you should not decide this case based on which side presented more witnesses. Instead, you should think about each witness and each piece of evidence and whether you believe them. Then you must decide whether the testimony and evidence you believe proves beyond a reasonable doubt that defendant is guilty.[135]

A sidebar was held on the record, with the Judge, prosecutor, and defense attorney, where the lying in wait instruction was asked to be stricken from the record, but no other corrections were requested.[136] Then, after the two alternates were chosen and excused, defense counsel placed her objection on the record to the following:

> Criminal Jury Instruction 5.88, Character Evidence Regarding the Conduct of the Defendant, there was - - - the first paragraph was completely changed as to the evidence that the defense provided during trial, was that the witnesses - - - non-violence and domestic relationships. That was not as it was read to the jury. . . . And I'm just placing my objection on the record as - - - as to that.[137]

Defense counsel did not ask for the instruction to be corrected before the jury began deliberations.[138]

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[134] 1/18, 169-170.

[135] 1/18, 170.

[136] 1/18, 171-172.

[137] 1/18, 176-177.

[138] 1/18, 178.

After approximately four hours of deliberations, the jury found defendant guilty of first-degree murder.[139] On February 26, 2013, the trial court sentenced defendant to the mandatory life in prison.[140]

The Court of Appeals reversed based on the character instruction given, denied rehearing, and this Court then directed supplemental briefing in advance of argument on the case before the Court as to whether leave or other relief should be granted.

[139] 1/18, 176, 183; 1/22, 3, 13.

[140] 2/26, 7.

## Argument

### I.

**The "character alone raising a reasonable doubt" portion of M Crim JI 5.8a(1)) should not be given, and even if the remaining portion of the instruction should be given, it does not add to the general instructions to the jury on witness testimony. Here the trial judge did not give the instruction, but instead gave an irrelevant instruction, M Crim JI 5.8. Given the nature of the error, and the record of this case, defendant cannot show that the giving of the irrelevant instruction, and the absence of an instruction under M Crim JI 5.8a(1), was more probably than not outcome determinative.**

### A. The Nature of the Error

This Court has directed the parties to file supplemental briefs addressing "whether it is more probable than not that the failure to properly instruct the jury regarding evidence of the defendant's good character was outcome determinative." Required, then, is attention to the nature of the trial court's error. The trial court, as the People will explain, did not err in not instructing on character proof consistent with M Crim JI 5.8a(1); rather, the court erred in giving an *irrelevant* character instruction concerning testimony on character concerning credibility, M Crim JI 5.8, when no witnesses had testified on character of any witness for credibility.

In its opinion, the Court of Appeals found that the trial court erred by instructing on M Crim JI 5.8 rather than M Crim JI 5.8a(1):[141] "Rather than instruct the jury that defendant's good

[141] The Court of Appeals said that the trial court erred by 1) "fail[ing] to mention either defendant or his character evidence relating to his peacefulness," and 2) "fail[ing] to advise the jury that evidence of good character alone may be sufficient to create a reasonable doubt," concluding that reversible error had occurred because "Where a jury is not adequately instructed on the use of good character evidence, a trial court may be said to *deny a defendant the full benefit his character evidence might otherwise afford him*. See *People v Jassino*, 100 Mich 536,

character could be considered in relation to whether defendant committed the crime, the instruction references the truthfulness of some unnamed witness."[142] Because there was no character proof on credibility of any witness, the instruction given was simply irrelevant to the case. There *was* character proof presented by the defense by a witness testifying that she believed defendant to be peaceful and to have a reputation for that trait. And so, while giving M Crim JI 5.8, an irrelevant instruction, the trial court did not give any specific instruction on character proof as it was actually presented in the case. Is this error, let alone error that defendant can show was more probably than not outcome determinative in the case?

M Crim JI 5.8a(1) provides:

> You have heard evidence about the defendant's character for [peacefulness / honesty / good sexual morals / being law-abiding / (describe other trait)]. You may consider this evidence, together with all the other evidence in the case, in deciding whether the defendant committed the crime with which (he / she) is charged. Evidence of good character alone may sometimes create a reasonable doubt in your minds and lead you to find the defendant not guilty.

The People submit that the absence of this instruction here was not error at all, as it is not necessary, and in fact the last sentence, at least, should not be given. The reference guide to M Crim JI 5.8a lists a number of cases[143] in support of the instruction, but the cases do not require

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537; 59 NW 230 (1894)." Slip opinion at 5 (emphasis added).

[142] Slip opinion, at 4.

[143] *People v Whitfield*, 425 Mich 116, 130-131(1986); *People v Champion*, 411 Mich 468, 471 (1981); *People v Simard*, 314 Mich 624 (1946); *People v Lane*, 304 Mich 29 (1942); *People v Rosa*, 268 Mich 462, 465 (1934); *People v Trahos*, 251 Mich 592 (1930); *People v Powell*, 223 Mich 633, 640 (1923); *People v Van Dam*, 107 Mich 425, (1895); *People v Jassino*, 100 Mich 536 (1894); *People v Garbutt*, 17 Mich 9 (1868); *People v Taylor*, 159 Mich App 468, 488

an instruction of the sort provided in M Crim JI 5.8a, particularly that portion of the instruction providing that "evidence of good character alone may sometimes create a reasonable doubt."

**1. The cases reviewed: the Michigan cases**

*People v Garbutt* from 1868 is perhaps the earliest lead case on character proof, and was cited by the Court of Appeals here. In that case the charge was murder, and the defense included mitigation by provocation, intoxication, as well as insanity. Defendant put in evidence of his uniform good character before the incident. He made a late request for an instruction that "it is for the jury to consider whether such reputation tends to rebut the presumption of malice," which the court refused.[144] Justice Cooley for the Court made several points regarding the claim of error:

- That the evidence was admissible in the case was unquestionable, but it was equally unquestionable that *it could have no bearing whatever except upon the question of malicious intent*.

- Good character may not only raise a doubt of guilt which would not otherwise exist, but it may bring conviction of innocence.

- *The difficulty at this point lies in attempting to surround the jury with arbitrary rules as to the weight they shall allow to evidence which has properly been placed before them. This court has several times found it necessary to declare that no such arbitrary rules are admissible.* . . . the jury must be left to weigh the evidence, and to examine the alleged motives by their own tests. They can not properly be furnished for this purpose with balances which leave them no discretion, but which, under certain circumstances, will compel them to find a malicious intent when

(1987); *People v Thomas*, 126 Mich App 611 (1983).

[144] *People v. Garbutt*, 17 Mich at 26-27.

> they can not conscientiously say they believe such an intent to exist.[145]

It cannot be said that *Garbutt* compels the instruction in M Crim JI 5.8a(1); indeed, at least some of its language suggests that instructions giving juries rules for the weighing of evidence are misguided. The parties should argue the weight of evidence, the People submit, without judicial thumbs on the scale.

Nor does *Jassino*, also relied on by the Court of Appeals here, compel the instruction. There the trial judge instructed as to character that

> Now, the good character of this respondent has been put in question. A man's good character is a valuable thing under all circumstances, and *it is proper evidence to be considered by a jury in a doubtful case* to determine whether or not a man having that good character would commit such an offense. It often avails, and should avail, to acquit a man under such circumstances; but *when there is positive proof of the commission of an offense, then good character cannot avail to overthrow that proof*."[146]

Defense counsel had requested the jury be instructed that "The jury have the right to give defendant's reputation, proved, such weight as they think it is entitled to."[147] The court held that by the instruction given—"when there is positive proof of the commission of an offense, then good character cannot avail to overthrow that proof—"the defendant was denied the benefit of proof of good character if the jury should find positive evidence tending to show the commission of the offense. Evidence of good character is admissible not only in a case where doubt otherwise

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[145] *People v. Garbutt*, 17 :Mich at 26-27.

[146] *People v. Jassino*, 100 Mich. 536, 537 (1894) (emphasis added).

[147] *People v. Jassino*, 100 Mich. at 537.

exists, but may be offered for the purpose of creating a doubt."[148] Because character evidence may be offered for the purpose of creating a doubt, an instruction to the contrary in cases of "positive proof" of the crime is erroneous, but this does not mean that an instruction on character proof, particularly one that character proof alone may raise a reasonable doubt, is *required*, on pain of reversible error.

Similar, in *Van Dam*, cited in the reference guide to M Crim JI 5.8a, the difficulty was not a failure to instruct but the content of the instruction given. The court instructed that "if a man residing in a community has always borne the reputation of being a good man, and good, respectable citizens come in and swear that he has always held a good character, *and when, in regard to the offense charged, there seems to be an even, or nearly an even, conflict as to whether he is, or whether he is not, guilty*, then that good character, put into the balance, ought to have a great deal of weight in such a case. Oftentimes it would be conclusive." This Court found the instruction misleading because character proof is "not to be limited to cases where there is an even conflict as to whether the respondent is or is not guilty."[149] The case says nothing about a duty to instruct specially on character proof at all, or to give a special instruction on character proof standing alone raising a reasonable doubt, but holds that an *improper* instruction limiting the use to which the jury can put the evidence may is reversible.[150]

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[148] *People v. Jassino,* 100 Mich. at 537.

[149] *People v. Van Dam*, 107 Mich. 425, 428-429 (1895) (emphasis added).

[150] *People v Powell*, 223 Mich 633, 640 (1923), cited in the instruction's reference guide, has nothing to do with instructing on character proof. *People v. Trahos,* 251 Mich. 592 (1930), again cited in the reference guide to the Model Instruction, simply found no error in the refusal to give an instruction that character proof can raise a reasonable doubt where no character proof was presented by the defense. *People v Rosa*, 268 Mich 462, 465 (1934), also cited in the reference guide,

The *Lane*[151] case, cited in the instructions's reference guide, is one where an instruction was requested and none given. Though citing several cases involving erroneous instructions on character,[152] the Court also cited several cases where the refusal to instruct on character was found erroneous.[153] The case does not discuss the nature of any other instructions that may or may not have been given on consideration of the evidence, and does not say that it is necessary to instruct on character evidence alone raising a reasonable doubt.[154] To the extent the case appears to require a specific character instruction on request as a matter of right, this Court should turn its face from it, for reasons that will be explained.

The most that can be derived from the Michigan cases is that an instruction unduly limiting the use to which the jury may put character evidence is improper, and that the failure to instruct at all on character where requested may be error, but without discussion in those cases of any other instructions given on the manner in which the jury is to consider evidence. The cases do not compel an instruction on character evidence standing alone raising a reasonable doubt.

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has nothing to do with instructing on character proof.

[151] *People v Lane*, 304 Mich 29 (1942).

[152] See 304 Mich. at 30-33.

[153] See 304 Mich. at 33-34. The Court cited *People v. Lee*, 258 Mich. 618 (1932) and *People v. Lewis*, 264 Mich. 83 (1933), where instructions were refused, but the instructions in general on witnesses was not discussed,

[154] *People v Simard*, 314 Mich 624 (1946) is to the same effect. *People v Champion*, 411 Mich 468, 471 (1981), cited in the reference guide, has nothing to do with instructing the jury on character proof, nor does *People v Whitfield*, 425 Mich 116, 130-131(1986) (which says regarding character proof that "Both the value and the wisdom of presenting character evidence have been doubted. It is thought that such evidence typically adds little of relevance to the determination of the actual issues in a case and is likely to inject extraneous elements"). 425 Mich. at 129-130.

**2. The cases reviewed: the federal cases**

Federal circuits almost uniformly reject the "character evidence alone raising a reasonable doubt instruction," and where an instruction on character is included within the circuit's pattern criminal instructions, a failure to give it has been found not reversible, in light of other instructions on consideration of evidence. It was for a time said that the Supreme Court cases of *Edgington v United States*[155] and *Michelson v United States*[156] stood for the proposition that a "standing alone" character instruction should be given. But in *Edgington* the trial judge instructed that "evidence of good character is no defense against crime actually proven . . . .good character goes to the jury with special force wherever the commission of the crime is doubtful."[157] Because good character can "alone create a reasonable doubt," an instruction *limiting* the importance of the evidence to "doubtful" cases was mistaken. In *Michelson* instructions on character were not involved, but testimony on character. The Court said that "this line of inquiry firmly denied to the State is opened to the defendant because character is relevant in resolving probabilities of guilt," the Court also saying that "such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and . . . in the federal courts a jury in a proper case should be so instructed."[158]

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[155] *Edgington v United States*, 164 US 361, 17 S Ct 72, 41 L Ed 467 (1896).

[156] *Michelson v United States*, 335 US 469, 69 S Ct 213, 93 L Ed 168 (1948).

[157] 17 S Ct. at 73.

[158] 69 S Ct. at 219.

Federal circuit courts of appeal do not read these cases as establishing a requirement for a "sanding alone" character instruction. In *United States v Pujana-Mena*,[159] a 1991 case, the court noted that "Seven circuits [as of that time] have held that a defendant is not entitled to a 'standing alone' charge."[160] The court found "no support" for such an instruction in either *Edgington* or *Michelson*, the latter of which the court referred to as "the other Supreme Court case that has proven troublesome for courts considering this issue," noting that the case did not concern a jury charge on the subject at all.[161] The court quoted with approval a 7th Circuit opinion that:

> Nothing in this passage [that from *Michelson* regarding character evidence raising a reasonable doubt] says that character evidence *should be singled out for special attention by juries*. It simply states that 'in some circumstances'—presumably those where the case is close—character evidence alone may push things over the line of reasonable doubt. Unquestionably true, but it does not imply any particular instruction.[162]

The court concluded that a "standing alone" character instruction "threatens to interfere with one of the quintessential functions of the jury—to determine the relative weight, if any to be given to particular evidence . . . . . it mistakenly conveys to the jury the message that character evidence 'has some special ability to create a reasonable doubt; [which] it does not,'"[163] noting Judge

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[159] *United States v Pujana-Mena*, 949 F 2d 24 (CA, 2, 1991).

[160] 949 F 2d at 28, fn. 2.

[161] 949 f 2d at 29.

[162] 949 F2d at 29 (emphasis supplied), quoting *United States v Burke*, 781 F 2d 1234 (CA 7, 1985).

[163] 949 F2d at 30.

Learned Hand's observation that "'evidence of good character is to be used like any other, once it gets before the jury, and the less they are told about . . . what they shall do with it, the more likely they are to use it sensibly.'"[164]

### 3. Federal pattern instructions

The federal circuit pattern instructions, as indicated in *Pujana-Mena*, almost uniformly do not contain a "standing alone" character instruction. Generally, they simply say that character evidence should be considered along with the other evidence:

*First Circuit*

> Defendant] presented evidence to show that [he/she] enjoys a reputation for honesty, truthfulness and integrity in [his/her] community. Such evidence may indicate to you that it is improbable that a person of such character would commit the crime[s] charged, and, therefore, cause you to have a reasonable doubt as to [his/her] guilt. You should consider any evidence of [defendant]'s good character along with all the other evidence in the case and give it such weight as you believe it deserves. If, when considered with all the other evidence presented during this trial, the evidence of [defendant]'s good character creates a reasonable doubt in your mind as to [his/her] guilt, you should find [him/her] not guilty.
>
> Comment(s) to the instruction
>
> This instruction is based upon United States v. Winter, 663 F.2d 1120, 1146-49 (1st Cir. 1981), and United States v. Lachmann, 469 F.2d 1043, 1046 (1st Cir. 1972). *The First Circuit explicitly rejects the instruction that good character evidence 'standing alone' is sufficient to acquit.* Winter, 663 F.3d at 1145 (emphasis supplied).

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[164] 949 F2d at 30, quoting *Nash v United States*, 54 F2d 1006,1007 (CA 2, 1932). See also *United States v Gupta*, 747 F3d 111 (CA 2, 2014) ("The district court declined to give such an instruction because it 'artificially singles out one aspect of the proof and gives it sort of prominence above all others by implication,'. . . . The district court's understanding of the law of this Circuit was correct. We have held that an instruction that character testimony may by itself raise a reasonable doubt is not required").

*Third Circuit*

You have heard (reputation)(opinion)(reputation and opinion) evidence about whether the defendant has a character trait for (name trait, such as truthfulness, peacefulness, honesty, being a law-abiding citizen, etc.).

*You should consider this character evidence together with and in the same way as all the other evidence in the case* in deciding whether the government has proved the charge(s) beyond a reasonable doubt (emphasis supplied)

*Fifth Circuit*

Where a defendant has offered evidence of good general reputation for [opinion testimony concerning]: truth and veracity, honesty and integrity, or character as a law-abiding citizen, you should consider such evidence along with all the other evidence in the case.

Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character with respect to those traits would commit such a crime.

*Sixth Circuit*

You have heard testimony about the defendant's good character. *You should consider this testimony, along with all the other evidence, in deciding if the government has proved beyond a reasonable doubt that he committed the crime charged* (emphasis supplied)

*Seventh Circuit*

You have heard testimony about the defendant's [good character; character for _____]. *You should consider this testimony together with and in the same way you consider the other evidence* (emphasis added).

*Eighth Circuit*

[No instruction recommended.]

Committee Comments

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> The Eighth Circuit, along with some other circuits, has disapproved the giving of a "standing alone" instruction (that proof of the defendant's good character, standing alone, may be sufficient to create a reasonable doubt with respect to such evidence) with regard to such evidence.

*Ninth Circuit*

> Committee Comment
>
> The Committee believes that *the trial judge need not give an instruction on the character of the defendant* when such evidence is admitted under Fed. R. Evid. 404(a)(1) *because it adds nothing to the general instructions regarding the consideration and weighing of evidence*. . . . (emphasis supplied)..

*Tenth Circuit*

> [The defendant has offered evidence of his reputation for good character.] [The defendant has offered evidence of someone's opinion as to his good character.] You should consider such evidence along with all the other evidence in the case. Evidence of good character may be sufficient to raise a reasonable doubt whether the defendant is guilty, because you may think it improbable that a person of good character would commit such a crime. Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt.
>
> You should also consider any evidence offered to rebut the evidence offered by the defendant. You should always bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

*Eleventh Circuit*

> Evidence of a defendant's character traits may create a reasonable doubt. You should consider testimony that a defendant is an honest and law-abiding citizen along with all the other evidence to decide whether the Government has proved beyond a reasonable doubt that the Defendant committed the offense.

**4. The absence of an instruction is not error, let alone error that would work a miscarriage of justice**

The thrust of most of the federal instructions, then, is that the jury should consider this character evidence together with and in the same way as all the other evidence. And the absence

of even this instruction on character is not necessarily error, for as one opinion has noted "It is clear from the language of this instruction [the Sixth Circuit pattern instruction] that it does not add anything to the jury's general instruction for witness testimony. Rather, character evidence is to be considered 'along with all the other evidence.' This is something the jury would already do under the general instructions for witness testimony. As the district court noted, '[t]he standard for assessing the content of the character witness' testimony is essentially the same.' Thus, a specific instruction for character witnesses was not necessary. The absence of the character witness instruction did not prevent the jury from considering this evidence, *it merely prevented the evidence from being highlighted as the defendant requested.*"[165]

So here. The "standing alone" portion of M Crim JI 5.8a should not be given, and the remaining portion of the instruction—"You may consider this evidence, together with all the other evidence in the case, in deciding whether the defendant committed the crime with which (he / she) is charged"—"does not add anything to the jury's general instruction for witness testimony," and the absence of such an instruction "[did] not prevent the jury from considering the evidence, it merely prevented the evidence from being highlighted as the defendant requested."

No error occurred at all here, then, outside the giving of the irrelevant instruction on M Crim JI 5.8. This Court should find that M Crim JI 5.8a(1) need not be given, and that the final sentence *should not* be given. Counsel can present his evidence, the prosecution can present rebuttal evidence to it or not, and the parties can argue its weight and meaning to the jury,

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[165] *United States v. Kirkland* 34 F3d 1068 (CA 6, 1994) (emphasis supplied). The opinion is unpublished, but, the People submit, persuasive on the point.

including an argument by the defense that if the evidence is believed it may itself raise a reasonable doubt. Why should the judge intervene with an instruction on the matter? Is it appropriate for the judge to highlight particular testimony in this way, or should the weight and use of the evidence be left to the parties, so long as within permissible bounds? The People think such instructions put an inappropriate judicial thumb on the scale. As the 7th Circuit Instruction Committee Comment observes, "*A 'standing alone' instruction invites attention to a single bit of evidence and suggests to jurors that they analyze this evidence all by itself. No instruction flags any other evidence for this analysis -- not eyewitness evidence, not physical evidence, not even confessions. There is no good reason to consider any evidence 'standing alone.*'"[166]

Particularly in the context of the other instructions given, it cannot be said that error, let alone error occasioning a miscarriage of justice, occurred here. The jury here was instructed that "a reasonable doubt is a fair, honest doubt growing out of the evidence or the lack of evidence," [167] and that the jurors "should consider all the evidence that you believe."[168] They were also instructed that "As jurors you must decide what the facts are. That's your job and that's nobody else's job. *You must think about all of the evidence and decide each piece of evidence, what it means and how important you think it is.* That includes whether you believe what each of the

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[166] Cf. *People v. Young*, 472 Mich. 130 (2005). And see *United States v. Akinsanya,* 53 F.3d 852, 857 (CA 7, 1995): "The pattern jury instruction which the district court gave was an accurate statement of the law regarding the weight to be accorded character evidence. There was no need to duplicate the charge to the jury *or emphasize the importance of one type of evidence over another*. . . . (instructions which are accurate statements of the law and which are supported by the record will not be disturbed on appeal). The law is clear in this Circuit, the 'standing alone' instruction 'even if allowable' is 'never necessary'" (emphasis supplied).

[167] 1/18, 155

[168] 1/18, 161.

witnesses said, what you decide about any fact in the case is final."[169] These instructions were adequate; certainly, if no "standing alone" instruction is required on request, it cannot be said that the instructions given more probably than not were outcome determinative in the case, even if the remaining portion of M Crim JI 5.8a(1) should have been given, as it says only that "You may consider this evidence, together with all the other evidence in the case, in deciding whether the defendant committed the crime with which (he / she) is charged," which is plain from the other instructions on jury consideration of *all* evidence.

**B. Defendant Has Not Carried *His* Burden of Showing That it Is More Probable than Not That the "Error" Was Outcome Determinative Even if Some Error Occurred, in Light of the Defense Presented and the Evidence in the Case**

This Court has observed that "Both the value and the wisdom of presenting character evidence have been doubted. It is thought that such evidence typically adds little of relevance to the determination of the actual issues in a case and is likely to inject extraneous elements."[170] And here character proof—which this Court has said "typically adds little of relevance"—was hardly important to defendant's theory of defense, as demonstrated quite clearly by his closing argument. And defendant was *not* deprived of the benefit of his proofs on the point, as he was absolutely free to argue to the jury that he had presented witnesses on the defendant's character for peacefulness, and argue the weight the jurors should give that evidence, and the jury was properly instructed, as indicated previously, on consideration of all the evidence.. So, what did counsel say regarding the character proof presented? *Not one word.*[171] The defense argument

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[169] 1/18, 154.

[170] *People v. Whitfield*, 425 Mich. 116, 129-130 (1986).

[171] See 1/18, 129-146.

was that the prosecution case "amounted to nothing" and "added up to zero" because the proofs were inadequate and the witnesses not credible, and that in fact defendant had "zero motive." This was also the theme of counsel's opening statement, where nary a word was spoken regarding the character of the defendant or character proof.[172]

The *evidence* defendant presented—and chose not to argue to the jury—was before the jury for consideration, it simply was not highlighted by instruction. Even if the lack of such an instruction is viewed as error, the defendant cannot, in the context of the evidence, and of the instructions given, as discussed above, show that the error was more probably than not outcome determinative. The record reveals that two witnesses immediately identified the intruder in the home on the night of the murder as defendant, defendant's shoes were found at the scene, defendant had threatened to "get Melvin" if that was the last thing he did, and the intruder knew where to find the murder weapon inside the home.[173]

Defendant's character evidence that he was "peaceful" and "against violence," primarily before the murder occurred, had very little weight, especially in light of the evidence presented. The character evidence to which an instruction would have referred, the absence of which the Court of Appeals found more probably than not was outcome determinative, can be summarized as follows. Kim Harden grew up in Highland Park, but moved to California to go to school in 1980.[174] Harden described defendant like a "cousin" to her, she knew defendant her whole life,

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[172] 1/15, 42-50.

[173] The defendant used a knife from the block set before, when he stabbed a knife in the mattress. 1/15, 91-94.

[174] 1/18, 95.

they lived on the same block, and their parents were very close.[175] After Harden moved to California, she returned to Michigan on occasion,[176] and when she did, she would visit defendant's family home, but she would only see defendant if he happened to be at the family home.[177] Harden knew Louise Kountz and throughout the 1980s, saw defendant and Kountz together about three or four times, and to her defendant appeared to be in love.[178] Harden described defendant as peaceful and against violence.[179]

Harden's minimal contact with defendant between 1980 and 1985 provides very little weight to her opinion testimony of defendant's reputation in the community, as she did not live in the community during that time and only personally saw defendant on occasion.[180]

The evidence proved defendant's guilt beyond a reasonable doubt. Two witnesses immediately identified the intruder as defendant. As Melissa Kountz was walking down the stairs to call the police, she saw the shadow of a man walking down the stairs ahead of her.[181] The build and smell of the man ahead of her confirmed that the man was in fact defendant.[182]

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[175] 1/18, 93.

[176] 1/18, 100. During the period of 1980-1985, Harden only return home on the holidays and during summer breaks.

[177] 1/18, 95-97.

[178] 1/18, 103-104.

[179] 1/18, 100.

[180] Also because defendant was in the army from 1974 through 1977, it appears Harden's contact with defendant during that time was also limited. 1/18, 77. Harden makes no mention of defendant being in the army.

[181] 1/15, 113.

[182] 1/15, 113-114.

Kimberly Stokes also identified the intruder as defendant. Kimberly saw the shadow of a man in their home as they were walking down the stairs and testified that the height and build of the man matched defendant's.[183] Both Melissa and Kimberly lived with defendant for over four years and were familiar with defendant.[184]

Not only did Melissa and Kimberly recall the man in their home to be defendant at trial, but they were certain it was defendant immediately after the murder when they ran to their neighbor's home to call 9-1-1. Carolyn Rhodman testified that on December 28, 1983, she woke up to commotion outside her home, she heard the doorbell ring, and answered the door to Melissa and Kimberly.[185] Carolyn described the girls as very upset, shaking, and crying.[186] They immediately said "defendant killed Melvin."[187] Camille Rhodman, also at home when Melissa and Kimberly sought to call 9-1-1, heard Melissa say that "defendant came into the house."[188]

In addition to Melissa and Kimberly's identification of the intruder as defendant, the evidence found in the home supports the finding that defendant stabbed Melvin. The intruder in 88 Louise broke the basement window, placed the puppy that usually stayed in the basement in the freezer, unscrewed two fuses, then went upstairs in the kitchen.[189] While in the kitchen, the

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[183] 1/16, 183-184.

[184] 1/15, 56; 1/17, 17.

[185] 1/17, 94-95.

[186] 1/17, 97.

[187] 1/17, 97.

[188] 1/17, 118.

[189] 1/15, 131-134.

intruder grabbed a butcher knife that was part of a knife block set, went upstairs and stabbed Melvin one time.[190] As the girls went outside no cars were seen leaving the scene.[191] A pair of defendant's shoes with a sponge tapes to the bottom of one shoe, which were not there before, were found behind the kitchen door.[192] The evidence supports the finding that defendant was the intruder. Defendant was aware of the layout of the home because he lived there, he knew of the butcher knife block set, because he used a knife from that set to stab the mattress,[193] he knew where Melvin slept, and was living on the same street.[194] This evidence supported Melissa and Kimberly's identification of defendant.

The evidence also established that defendant had a motive to kill Melvin. Before the murder, defendant blamed Melvin for the demise of his relationship with Louise and said "if it's the last thing I do I'm going to get Melvin."[195] And in fact that was the last thing defendant did before he left Michigan.[196] Even if it was believed that defendant was peaceful and against violence, primarily sometime before 1980,[197] or even during Harden's sporadic visits with

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[190] 1/15, 129.

[191] 1/15, 117.

[192] 1/16, 10-11.

[193] 1/15, 93-94, 129.

[194] 1/15, 77.

[195] 1/15, 99.

[196] After December 28, 1983, defendant was not seen in Highland Park again. 1/16, 192; 1/18, 29.

[197] Harden left the state of Michigan in 1980 and defendant was in the army between 1974 through 1977.

defendant, it does not outweigh the evidence presented. The evidence in summary is the following: defendant was abusive around the time of the murder, two witnesses in the home the night of Melvin's murder said the intruder in their home was defendant, defendant had a vendetta against Melvin and threatened to "get" Melvin, defendant's shoes were found in the home on the night of the murder-but were not there before- and the intruder knew a puppy would be in the basement, where the fuse box was, and where in the house he could find the murder weapon to use on Melvin.

In this context, then, where the character proofs presented were not even argued by defense counsel, no miscarriage of justice appears. As this Court has put the defendant's burden in this regard,

> The object of this inquiry is to determine if it affirmatively appears that the error asserted "undermine[s] the reliability of the verdict." *Id.* at 211, 551 N.W.2d 891. In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether *it is more probable than not that a different outcome would have resulted without the error*. Therefore, the bottom line is that § 26 presumes that a preserved, nonconstitutional error is not a ground for reversal unless "after an examination of the entire cause, it shall affirmatively appear" that it is more probable than not that the error was outcome determinative.[198]

If error there was—beyond the giving of an irrelevant character instruction—defendant has not carried his burden of showing that "after an examination of the entire cause, it affirmatively appears" that it is more probable than not that the error was outcome determinative. For this reason, the Court of Appeals should be reversed.

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[198] *People v. Lukity*, 460 Mich. 484, 495-496 (1999).

## Relief

Wherefore, the People respectfully request that leave be granted, the Court of Appeals reversed, and defendant's conviction reinstated.

Respectfully submitted,

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